RECENT DEVELOPMENTS

HAMM V. CITY OF ROCK HILL: OUT OF THE FRYING PAN

379 U.S. 306 (1964)

A recent comment on the progress of civil rights litigation began with the observation:

> The sit-in cases of 1964, like the sit-in cases of 1963, gave no answer to one of this nation's most troublesome constitutional questions: To what extent does the Fourteenth Amendment forbid the states to support private choice; when under the Constitution that choice could not be made by the state itself through its judiciary, its legislature, or its executive?[1]

The article later noted:

> On the day of the decision in *Bell,* the Court granted certiorari in two additional sit-in cases, *Hamm v. City of Rock Hill* and *Luppe* [*sic*] *v. Arkansas.* They seem to present the main issue squarely.[2]

The issue, although squarely presented, was once again avoided. But in the process a new issue of constitutional law was decided: For the first time the common law rule of abatement of crimes was held to apply through the impact of a civil statute of one sovereignty on the criminal statute of another sovereignty.

On June 7, 1960, petitioner in *Hamm v. City of Rock Hill,* and a companion entered a variety store, and, after making purchases in other parts of the store, seated themselves at the lunch counter. Service was denied, and petitioner and his companion were asked to leave. When they refused, the police were called, and the two were arrested. They were convicted under the South Carolina trespass laws,[3] and the convictions were affirmed by the South Carolina Supreme Court.[4] In *Lupper v. Arkansas,* a companion case to *Hamm,* petitioners were arrested for participating in a sit-in demonstration. A group of Negroes had entered a department store, seated themselves at the lunch counter, and requested service. This group too was asked to leave. They refused, police were summoned, and

1 Paulsen, "The Sit-in Cases of 1964: But Answer Came There None," in Supreme Court Review 137 (1964).

2 *Id.* at 169. (Footnotes omitted.) The reference to *Bell* is to Bell v. Maryland, 378 U.S. 226 (1964), to be discussed later. Certiorari was granted in Hamm v. City of Rock Hill, 377 U.S. 988 (1964); and in Lupper v. Arkansas, 377 U.S. 989 (1964).

3 S.C. Code § 16-388 (1962).

4 City of Rock Hill v. Hamm, 241 S.C. 420, 128 S.E.2d 907 (1962).

petitioners were arrested. They were convicted of refusal to leave a business establishment after request,[5] which convictions were affirmed.[6] The Supreme Court granted certiorari in each case.[7] Six separate opinions were written resulting in a reversal of the trespass convictions by a five-to-four majority.

Hamm is both an innovation in the law and a natural product of its decisional environment. It emerges from a stream of troubled waters, beset, on the one hand, by the call for a constitutional principle that would sweep away the injustice and human derogation that the Black Codes fathered and the *Civil Rights Cases*[8] nurtured; and, on the other hand, by the admonitions that such a principle would lead to the demise of property as the Anglo-American foundation of liberty or, at a minimum, to an unwise balance between significant interest groups. The Court, however, avoided the constitutional dilemma posed by the conflict of human rights with property rights. The Court decided that the Civil Rights Act of 1964[9] abated the convictions because the act removed the crime and in its place created a right.

The conflict between viable state criminal statutes and a federal civil statute was resolved in favor of the federal authority via the supremacy clause. This was not a case of the same act's giving rise to both state and federal criminal liability where state and federal activity can coexist in harmony.[10] Nor was it a case of a state statute's coming into conflict with the preexisting superior rights of the federal government, where the state regulation must always give way to federal regulation—as in the area of interstate commerce.[11] Rather, *Hamm* involves the intrusion of federal regulation into an area which historically belongs to the states—the protection of private property through the use of trespass statutes.

The question of timing is central to the problem, as it is the state's policy and regulation which are preexisting, not the federal policy. A first reaction to a state-federal conflicts problem yields a perhaps natural conclusion that federal preemption will dissipate all conflicting state action; for when the federal government enters a proper field, inconsistent state policy, though existing prior to that occupation, must fall. The Civil Rights Act, however, does not involve preemption. The state statutes are not invalidated; rather, they continue to exist. This is the case of a federal statute tangentially touching and brushing aside a specific application of an otherwise valid state statute.

The import of what the court did in *Hamm* can best be grasped after an examination of the total context into which *Hamm* injects itself.

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[5] Ark. Stat. Ann. § 41-1433 (1964).

[6] Lupper v. Arkansas, 236 Ark. 596, 367 S.W.2d 750 (1963).

[7] Hamm v. City of Rock Hill, 377 U.S. 988 (1964); Lupper v. Arkansas, 377 U.S. 989 (1964).

[8] 109 U.S. 3 (1883).

[9] 78 Stat. 244 (1964), 42 U.S.C. §§ 2000a to 2000h-6 (1964).

[10] See United States v. Lanza, 260 U.S. 377 (1922).

[11] See, *e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat) 419 (1827). The fact that the Civil Rights Act of 1964 is also a commerce clause statute will be commented upon later.

Southern attempts to keep intact the humiliating policy of segregation through use of breach of the peace statutes met with failure before an undivided court.[12] The Southern justification for arrests under such statutes was that the mere presence of Negroes in places of segregation would move onlookers to violence and thus constitute a breach of the peace.[13] Such convictions were reversed for lack of evidence in *Garner v. Louisiana*[14] and *Barr v. City of Columbia*.[15] Finally, in *Wright v. Georgia*, such arrests were held violative of the equal protection clause of the fourteenth amendment[16] and also violative of the due process clause for failure to give fair warning[17] because they were unconstitutionally vague.[18]

Trespass convictions fared differently. Though all such convictions were reversed, it was no longer a matter for consensus.[19] The 1963 civil rights cases[20] represented searches for state action. In *Peterson v. City of Greenville*,[21] the existence of a city ordinance requiring restaurants to maintain separate facilities and, in *Lombard v. Louisiana*,[22] public statements of the mayor and superintendent of police were found by the Court to satisfy the requirement of state action necessary to violate the equal protection clause.[23] The quest for state action was also carried on in the 1964 civil rights cases. In *Griffin v. Maryland*,[24] a park employee who had been deputized as a sheriff was found acting in a state capacity in arresting Negroes for trespassing. The convictions thus violated the equal protection clause. A Florida Board of Health regulation requiring separate toilet facilities was enough state participation to reverse trespass convictions in

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12 There were however, opinions concurring in result but for reasons other than the Court relied on; in Garner v. Louisiana, 368 U.S. 157, 176 (1961), Mr. Justice Douglas set forth his state-action-through-custom theory, which will be discussed later; in Barr v. City of Columbia, 378 U.S. 146 (1964), the Court was unanimous as to reversal of the breach of the peace convictions; in Wright v. Georgia, 373 U.S. 284 (1963), the Court unanimously reversed convictions as unconstitutionally vague.

13 368 U.S. at 171.

14 368 U.S. at 163.

15 378 U.S. at 151.

16 373 U.S. at 292.

17 373 U.S. at 293.

18 373 U.S. at 292.

19 In Barr v. City of Columbia, *supra* note 12, Mr. Justice Black wrote the opinion for a unanimous Court reversing the breach of peace convictions and also wrote a dissenting opinion to the per curiam reversal of the trespass conviction. There were five opinions altogether: a majority opinion, a per curiam opinion, two concurring opinions, and a dissent.

20 See generally Lewis, "The Sit-In Cases: Great Expectations," in Supreme Court Review 101 (1963).

21 373 U.S. 244 (1963).

22 373 U.S. 267 (1963).

23 See also Gover v. City of Birmingham, 373 U.S. 374 (1963), and Avent v. North Carolina, 373 U.S. 375 (1963), which were reversed on the basis of *City of Greenville*.

24 378 U.S. 130 (1964).

Robinson v. Florida.[25] *Bouie v. City of Columbia*[26] represented a shift of position by the Court. The Court did not reach the equal protection argument, but rather decided that the South Carolina Supreme Court's construction of a state statute, which defined trespass as "entry upon the lands of another . . . after notice,"[27] to include remaining on lands after being requested to leave, denied fair warning to the petitioners and thus violated the due process clause.[28]

Due process had not been used much in the civil rights area in striking down discriminatory practices.[29] Perhaps *Bouie* represented to Justices Goldberg and Douglas a new willingness on the part of the Court to listen to due process type objections to convictions under state trespass laws designed to maintain segregation. Such objections would point toward a constitutional principle that would do more than merely diffuse the impact of a state statute, leaving intact the basic statute, as is the effect of the equal protection clause; it would extirpate the statute and discredit the policy behind the law. The privileges and immunities clause, which, like the due process clause, uproots and expunges the challenged statute, was the weapon that they chose.[30]

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[25] 378 U.S. 153 (1964).

[26] 378 U.S. 347 (1964).

[27] S.C. Code Ann. § 16-386 (1962).

[28] The trespass convictions in Barr v. City of Columbia, *supra* note 12, were reversed per curiam on the basis of *Bouie*.

[29] In Boynton v. Virginia, 364 U.S. 454 (1960), the Court bypassed both equal protection and due process arguments to void convictions by statutory construction. In Garner v. Louisiana, 368 U.S. 157 (1961), the Court again declined to reach the constitutional questions— reversing convictions for lack of evidence—as the Court did in Barr v. City of Columbia, 378 U.S. 146 (1964). In Griffin v. Maryland, 378 U.S. 130 (1964), the trespass convictions in Barr v. City of Columbia, *supra;* Robinson v. Florida, 378 U.S. 153 (1964); and in Lombard v. Louisiana, 373 U.S. 267 (1963), and Peterson v. City of Greenville, 373 U.S. 244 (1963), the equal protection clause was used. In Wright v. Georgia, 373 U.S. 284 (1963), convictions were reversed as violating both clauses, the due process infirmity, as in Bouie v. City of Columbia, 378 U.S. 347 (1964), being lack of fair warning.

[30] Mr. Justice Jackson, concurring in Railway Express Agency v. New York, 336 U.S. 106, 111-13 (1949), stated the case for preference of the equal protection clause when the facts demonstrate violation of the fourteenth amendment:

> There are two clauses of the Fourteenth Amendment which this Court may invoke to invalidate ordinances by which municipal governments seek to solve their local problems . . . .
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> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance. Even its provident use against municipal regulations frequently disables all government —state, municipal and federal—from dealing with the conduct in question because the requirement of due process is also applicable to State and Federal Government. Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable . . . .
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> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.

Mr. Justice Douglas took the opportunity offered by the shift from equal protection to due process in a separate opinion in *Bell v. Maryland*,[31] to offer the discrimination-obliterating theory[32] that the right to be served in places of public accommodations is an attribute of national citizenship,[33] and that a place of public accommodation, though private property, is private property affected with a public interest.[34] Justice Douglas determined that:

> *Apartheid*, however, is barred by the common law as respects innkeepers and common carriers . . . . Why then . . . in the absence of a statute, should *apartheid* be give constitutional sanction in the restaurant field? . . . Constitutionally speaking, why should Hooper Food Co., Inc., or Peoples Drug Stores—or any other establishment that dispenses food or medicines—stand on a higher, more sanctified level than Greyhound Bus when it comes to a constitutional right to pick and choose its customers? . . . The duty of common carriers to carry all, regardless of race, creed, or color, was in part the product of the inventive genius of judges . . . . We should make that body of law the common law of the Thirteenth and Fourteenth Amendments so to speak. Restaurants in the modern setting are as essential to travelers as inns and carriers.[35]

Mr. Justice Douglas' call for a constitutional principle to uproot discrimination in this field was an admixture of the privileges and immunities clause and the due process clause. What the Justice could not protect as a privilege or immunity under the *Slaughter-house Cases*[36] could be sheltered in the name of substantive due process.[37]

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

[31] 378 U.S. 226 (1964).

[32] Mr. Justice Douglas stated in his concurring opinion in Heart of Atlanta Motel v. United States, 379 U.S. 241, 280 (1964), which upheld the Civil Rights Act of 1964 on the basis of the commerce clause only: "[A Fourteenth Amendment] construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history."

[33] 378 U.S. at 249.

[34] 378 U.S. at 252.

[35] 378 U.S. at 254-55.

[36] 77 U.S. (10 Wall) 273 (1869).

[37] See Munn v. Illinois, 94 U.S. 113 (1876).

Mr. Justice Black also wished to discuss the wisdom of using due process extirpation as against equal protection's simple proscription. In his dissenting opinion in *Bell,* Mr. Justice Black admonished that the course Mr. Justice Douglas would pursue would have ominous results:

> It would betray our whole plan for a tranquil and orderly society to say that a citizen, because of his personal prejudices, habits, attitudes, or beliefs, is cast outside the law's protection and cannot call for the aid of officers sworn to uphold the law and preserve the peace. The worst citizen no less than the best is entitled to equal protection of the laws of his State and of his Nation. None of our past cases justifies reading the Fourteenth Amendment in a way that might well penalize citizens who are law-abiding enough to call upon the law and its officers for protection instead of using their own physical strength or dangerous weapons to preserve their rights.[38]

Justices Douglas and Black thus stated the issue—to what extent does the fourteenth amendment forbid the states to support private choice—and resolved it contrarily. The manner in which the majority,[39] however, disposed of *Bell* was, in a sense, a paradigm for *Hamm* six months later. In *Bell* twelve Negro students were arrested for staging a sit-in in a restaurant in Baltimore in 1960. Their conviction for criminal trespass was affirmed by Maryland's highest court on January 9, 1962. On June 8, 1962, the City of Baltimore enacted a public accommodations ordinance[40] effective on the date of its enactment. On March 29, 1963, the Maryland Legislature adopted a public accommodations law[41] to be effective June 1, 1963, making it unlawful for the owner or operator of a place of public accommodation to refuse to serve persons because of race, color, or national origin. As in *Hamm,* the Negroes were arrested and convicted, and the convictions affirmed before the intervention of a civil rights statute. In *Bell,* of course, the intervening statutes were state, not federal, laws. The Court noted that the convictions were not final because they were still on review in the United States Supreme Court.[42] The Court vacated the convictions and remanded the case because:

> [U]nder the common law of Maryland, the supervening enactment of these statutes abolishing the crime for which petitioners were convicted would cause the Maryland Court of Appeals at this time to reverse the convictions and order the indictments dismissed. For Maryland follows the . . . common-law rule that

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38 378 U.S. at 327-28.

39 There were four opinions expressed. Mr. Justice Douglas did not join in the Court's remand but rather desired to reverse and dismiss the convictions. Mr. Justice Goldberg concurring with Mr. Justice Douglas concurred with the Court's decision to remand and wrote a concurring opinion of his own. Mr. Justice Black, with whom Justices White and Harlan concurred, wrote a dissenting opinion.

40 Baltimore City Code (1950 ed.) art. 14a, § 10A (Ordinance No. 1249).

41 Maryland Ann. Code art. 49B, § 11 (Supp. 1964).

42 378 U.S. at 232.

> when the legislature repeals a criminal statute or *otherwise* removes the state's condemnation from conduct which was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding, which, at the time of the supervening legislation, has not yet reached final disposition in the *highest* court authorized to review it.[43]

The Maryland saving clause statute[44] which saves convictions from common law abatement when a later statute is enacted repealing the crime was thought to be inapplicable to the convictions in *Bell* since:

> by its terms . . . it applies only to the "repeal," "repeal and re-enactment," "revision," "amendment," or "consolidation" of any statute . . . [but] the effect wrought upon the criminal trespass convictions by the supervening public accommodations laws would seem to be properly described by none of these terms.[45]

The constitutional question was thus avoided in *Bell* and the decisional environment in which *Hamm* was decided was near completion. There

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[43] 378 U.S. at 230. (Emphasis added.) The Court next quoted at length from a Maryland decision which is one of the best explanations of the common law rule of abatement, Keller v. State, 12 Md. 322, 325-27 (1858):

> It is well settled that a party cannot be convicted, after the law under which he may be prosecuted has been repealed, although the offense may have been committed before the repeal . . . . The same principle applies where the law is repealed, or expires pending an appeal or writ of error from the judgment of an inferior court . . . . The judgment in a criminal cause cannot be considered as final and conclusive to every intent, notwithstanding the removal of the record to a superior court. If this were so, there would be no use in taking the appeal or suing the writ of error . . . . And so if the law be repealed, pending the appeal or writ of error, the judgment will be reversed, because the decision must be in accordance with the law at the time of final judgment.

378 U.S. at 230-31.

[44] Maryland Ann. Code art. 1, § 3 (1957):

> The repeal, or the repeal and re-enactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal, shall not have the effect to release, extinguish, alter, modify or change, in whole or in part, any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, section or part thereof, unless the repealing, repealing and re-enacting, revising, amending or consolidating act shall expressly so provide; and such statute, section or part thereof, so repealed, repealed and re-enacted, revised, amended or consolidated, shall be treated and held as still remaining in force for the purpose of sustaining any and all proper actions, suits, proceedings or prosecutions, civil or criminal, for the enforcement of such penalty, forfeiture or liability, as well as for the purpose of sustaining any judgment, decree or order which can or may be rendered, entered or made in such actions, suits, proceedings or prosecutions imposing, inflicting, or declaring such penalty, forfeiture or liability.

[45] 378 U.S. at 233.

was a further development, however, when the Court, in *Heart of Atlanta Motel v. United States,*[46] held the Civil Rights Act of 1964 a constitutional exercise of congressional power under the commerce clause. The act granted the right to all persons to be served in places of public accommodation free from discrimination and segregation.[47] The act declared further:

> Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or *(c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.*[48]

The Civil Rights Act of 1964 intervened in *Hamm* after the state convictions had been affirmed by the highest state court, just as the Maryland public accommodations law and the Baltimore ordinance intervened in *Bell* after convictions had been affirmed. But, unlike *Bell,* this was a federal statute intervening upon a state trespass statute, not local legislation displacing earlier local legislation. There would be no reason to remand to the state court for consideration; the Supreme Court had to construe this federal act. There was no doubt as to trespass convictions arising after the act because sit-in demonstrators arrested for trespass now may clearly rely on the protection of section 203. But the question was what to do with *past* convictions. The Civil Rights Act of 1964 is a commerce clause statute, and Mr. Justice Harlan, dissenting in *Hamm,* asked the question: How can *past* convictions place any burden on *present* interstate commerce?[49] The answer is clearly that they cannot. Therefore, if the convictions were to be reversed, retroactive application of the Civil Rights Act of 1964 seemed unavoidable.

The problems inherent in retroactive application, however, are avoided once it is recognized that until the Supreme Court disposes of the case,

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[46] 379 U.S. 241 (1964).

[47] 78 Stat. 243 (1964), 42 U.S.C. § 2000a (1964):

> Sec. 201 (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

78 Stat. 244 (1964), 42 U.S.C. 2000a-1 (1964):

> Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule or order of a State or any agency or political subdivision thereof.

[48] 78 Stat. 244 (1964), 42 U.S.C. § 2000a-2 (1964). (Emphasis added.)

[49] 379 U.S. at 325.

that is, while the convictions are on direct review[50] in the Supreme Court, the case is still pending.[51] The fact that the convictions were pendent until the Supreme Court acted does not provide an answer to Mr. Justice Harlan's question, but the pendency of the convictions does shift the manner in which the Court can look at the effect the Civil Rights Act wrought upon these convictions. It is not simply a matter of delineating commerce clause criteria, rather the focus is upon the Civil Rights Act as a federal statute intervening upon state law, giving rise to the question of federal supremacy. The Civil Rights Act is not simply a commerce clause statute in this context, rather it can be viewed more abstractly as a federal statute conflicting with state law interpretation. The majority used the common law rule of abatement, just as it had suggested the Maryland court might on remand in *Bell,* and the supremacy clause to effect the reversal.

ABATEMENT

The federal common law rule of abatement was announced by Chief Justice Marshall in *United States v. The Schooner Peggy:*[52]

> It is in general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court but for the government, to consider whether it be a case proper for compensation. In such a case, the court must decide according to existing laws and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside.[53]

The United States also has a saving statute saving crimes committed before the repeal of the statute by later legislation which intervenes while

[50] Bell v. Maryland, 378 U.S. at 232.

[51] Gulf, C. & S. F. Ry. v. Dennis, 224 U.S. 503, 505 (1912).

[52] 5 U.S. (1 Cranch) 103 (1801).

[53] 5 U.S. (1 Cranch) at 110. Compare these words of Chief Justice Marshall with the Maryland expression of the common law rule in Keller v. State, *supra* note 43. See also Yeaton v. United States, 9 U.S. (5 Cranch) 281 (1809); United States v. Reisinger, 128 U.S. 398 (1888); Maryland v. B. & O.R.R., 44 U.S. (3 How.) 534 (1845).

the case is pending.[54] By its own terms the federal savings statute is limited to saving convictions upon the *repeal* of the statute making the conduct a crime.[55] It was intended to "save" crimes from technical abatement such as resulted in *United States v. Tynen*[56] where an intervening statute changed the penalty from "not less than 3 nor more than 5 years"[57] to imprisonment for "not less than one year and a fine not less than $300."[58] Therefore, like the Maryland savings statute in *Bell,* the federal savings statute was held inapplicable.

Prima facie then, the federal savings statute is not applicable. Further, the federal savings statute only applies to saving convictions under federal, not state criminal acts. Thus, in *United States v. Chambers,*[59] the federal savings statute was held inapplicable to crimes committed under the National Prohibition Act which was rendered inoperative, not repealed, by the twenty-first amendment, which also was not an act of Congress.[60]

Policy consideration can likewise put the savings statute in abeyance. Section 203 of the Civil Rights Act, protecting the *attempt* to enforce the rights secured by the act would have guarded petitioners from the state's sanctions if the act had been in effect when they committed their criminal trespass. The act intervened while the convictions were still on appeal and even if the savings statute were prima facie applicable, section 203 would cause its non-exercise because "the [savings statute] must be

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[54] 1 U.S.C. § 109 (1964), reads:

> The *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. 61 Stat. 635 (1947), 1 U.S.C. § 109 (1964). (Emphasis added.)

[55] The Maryland saving statute was limited to "repeal," "repeal and re-enactment," "revision," "amendment" or "consolidation" of a statute or any part of a statute. See *supra* note 45.

[56] 78 U.S. (11 Wall.) 88 (1870).

[57] *Id.* at 90.

[58] *Ibid.*

[59] 291 U.S. 217 (1934).

[60] The Court in *Chambers* said:

> [T]his provision [saving statute] applies, and could only apply, to the repeal of statutes by the Congress and to the exercise by the Congress of its undoubted authority to qualify its repeal and thus keep in force its own enactments . . . . The Congress, however, is powerless to expand its constitutional authority . . . . The National Prohibition Act was not repealed by an Act of Congress but was rendered inoperative, so far as authority to enact its provisions was derived by the Eighteenth Amendment, by the repeal, not by the Congress, but by the people, of that Amendment.

291 U.S. at 224-25. See Massey v. United States, 291 U.S. 608 (1934).

enforced *unless* either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of [the savings statute]."[61] The applicability of the saving statute having been thus impaired, the common law rule is left to operate upon these pending convictions precisely in those situations for which it had been created, *i.e.*, the supervention of legislation removing or denying the crime before the convictions become final on appeal.[62] Always before, however, abatement had operated only in the sphere of a single sovereignty, that is, English law intervened upon English law;[63] federal law upon federal law;[64] and state law upon state law.[65] For the first time, then, the effect of the common law rule resulted from the interplay of the statute of one sovereignty, the federal government, upon the statute of other sovereignties—South Carolina and Arkansas.

Preemption

The Court chose the supremacy clause as the vehicle by which to reach its result. The supremacy clause encompasses both quantitative and qualitative tests for its application: quantitative determination of how far the federal government has preempted a field of regulation and over-ridden state law, and qualitative determination of what kinds of state interference or duplication will be tolerated in areas which Congress has entered but not foreclosed. Quantitatively, when the federal statute has been incomplete in its regulation so that there is room for the state to operate with its traditional police powers, the two sets of regulations can exist harmoniously.[66]

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[61] Great No. Ry. v. United States, 208 U.S. 452, 465 (1908).

[62] The common law rule of abatement had its origins in English common law. See Rex v. Cator, 4 Burrows 2026, 98 Eng. Reps. 56 (1767); King v. Davis, 1 Leach Crown Cases 306, 168 Eng. Reps. 238 (1783).

[63] See, *e.g.*, Rex. v. Cator, *supra* note 62; King v. Davis, *supra* note 62.

[64] See, *e.g.*, United States v. The Schooner Peggy, *supra* note 52; Yeaton v. United States, *supra* note 53; United States v. Reisinger, *supra* note 53; Maryland v. B. & O.R.R., *supra* note 53.

[65] See, *e.g.*, Keller v. State, *supra* note 43.

[66] In Atlantic Coast Line R.R. v. Georgia, 234 U.S. 280 (1914), holding that Georgia can require railroads to equip locomotives with headlights in the absence of federal legislation, the Court said at 292:

> If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a single remedy . . . . That remedy does not rest in a denial to the State, in absence of conflicting federal action, of its powers to protect life and property within its borders but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient.

In Kelly v. Washington, 302 U.S. 1 (1937), holding that Washington may inspect hulls of tugboats although there is a federal statute regulating tugboats which does not call for inspection of hulls, the Court said at 9-13:

The Court in *Hamm* was not concerned with the quantitative determination. The case does not raise the question whether the Civil Rights Act preempted the field of public accommodations laws, thus invalidating state statutes on the same subject.[67] Rather, the Court was concerned with the qualitative determination under the supremacy clause.

Qualitative determinations under the supremacy clause arise independently of the question of federal occupation of a field. The quantitative question is whether there was, in fact, a collision of federal and state regulation, or in the alternative, whether the two systems may exist together. The qualitative question is: Given a federal policy, whether it preempts a field or not, what kind of state interference with that policy will be endured? At the lower end of the scale are the easily disposed of cases where a state statute clearly clashes with a federal statute and must give way.[68]

> [T]here necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. . . . And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. . . . [T]he exercise by the State of its police power, which would be valid if not superseded by Federal action, is superseded only where the repugnance or conflict is so "direct and positive" that the two acts cannot "be reconciled or consistently stand together." . . . [T]he state law touches that which the federal laws and regulations have left untouched.

In *DeVeau v. Braisted,* 363 U.S. 144 (1960), the Court held that New York can regulate the persons entitled to collect dues from labor organizations without violating the National Labor Relations Act or the Labor Management Relations Act. See also Rice v. Chicago Bd. of Trade, 331 U.S. 247 (1947), holding that Illinois can regulate trading in futures without violating the Commodity Exchange Act. Acts which are criminal under both state and federal laws can be punished by both. United States v. Lanza, 260 U.S. 377 (1922) (violation of Washington and federal prohibition laws). See also Fox v. Ohio, 46 U.S. (5 How.) 410 (1847) (conviction for violation of Ohio and federal laws on coinage). But when a congressional plan is discerned as occupying the field, such as the Smith Act's effect upon sedition, there is no room left for state regulation even if the state policy is only to supplement federal regulations. Pennsylvania v. Nelson, 350 U.S. 497 (1956).

[67] There is probably room for both federal and state public accommodation laws to operate harmoniously. See Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc., 372 U.S. 714 (1963).

[68] In McDermott v. Wisconsin, 228 U.S. 115 (1913), for example, the Court held that Wisconsin law cannot require labeling of syrup in a way which clashes with the Pure Food and Drug Act requirements. (Laws of Wisconsin 1907, § 4601 required the label "Glucose flavored with maple syrup" while the Pure Food and Drug Act, 34 Stat. 768 (1906), required the label "Corn syrup with cane flavoring").

State laws are invalid when they conflict with the constitutionally assigned province of federal powers, such as the commerce clause, even absent federal statutory law. See, *e.g.,* Minnesota v. Barber, 136 U.S. 313 (1890), where a Minnesota fresh meat inspection law was held to place a burden on interstate commerce in the absence of federal legislation.

Beyond the clearly discernible modes of conflict, the characterization of state-federal conflicts show how much more tangentially state regulation may brush against federal regulation. The focus is not upon *whether* a state statute, administrative regulation, or other kind of state action imposes itself upon paramount federal authority, but rather the focus is upon *how* that state action touches the federal regulation: whether there is a clear clash of both sovereigns attempting to regulate the same object, or a state regulation of an entirely separate matter which only indirectly interferes with an unconnected federal regulation.

Where the interest in an area is traditionally federal, a state's attempt to supplement and enter the field is easily comprehended as being precluded for lack of room.[69] Moreover, even where the regulation that clashes with federal law is within the police power of the state, traditionally allocated to the state sphere, it still must give way, even though the police power be otherwise valid.[70]

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[69] In Pennsylvania v. Nelson, *supra* note 66, the Court stated: "Federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'" 350 U.S. at 504.

[70] Thus, in Kesler v. Department of Public Safety, 369 U.S. 153 (1962), it was held that a state safety responsibility act denying the privilege of driving motor vehicles when there is an unsatisfied judgment, cannot be given an effect which would run contrary to the full privileges of a federal discharge in bankruptcy. The Court there found a "clear collision with a national law which has the right of way under the supremacy clause of Article VI." 369 U.S. at 172. The state cannot impose an additional condition upon a privilege under federal protection, such as registration of steamboats, though this regulation, if valid, would be within the police powers. In Sinnot v. Davenport, 63 U.S. (22 How.) 227, 243 (1859), the Court stated:

> [I]n the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two Acts could not be reconciled or consistently stand together; and, also, that the act of Congress should have been passed in the exercise of a clear power under the Constitution . . . .

The state cannot protect private interests by offering additional remedies where the federal act has given a remedy to protect the public interest and the state cannot *extend* the federal law, the conflict lying in remedies not rights. Thus, in Garner v. Teamsters Union, 346 U.S. 485 (1953), the Court held that Pennsylvania courts could not issue injunctions in labor disputes as Congress had given jurisdiction exclusively to the National Labor Relations Board. The Court said, at 500-01:

> We conclude that when Federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent a private right may conflict with a public one, the former is superseded.

[Now changed by Labor-Management Reporting and Disclosure Act § 701(a), 73 Stat. 519, 541 (1959), amending National Labor Relations Act § 14, 49 Stat. 457 (1935), 29 U.S.C. § 164(c)(1) (1964), allowing states to regulate where the National Labor Relations Board has declined jurisdiction.] The state cannot give

The State cannot pass legislation, the enforcement of which would conflict with the administration of a federal program.[71] Even where Congress legislates in an area traditionally occupied by the states, a state law is invalid where "the state policy *may* produce a result inconsistent with the *objective* of the federal statute."[72] This is true of even state

protection under its unfair competition law to something which is not validly protectable under federal patent laws. The Court, in Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 231-32 (1964), said:

> Just as a State cannot encroach upon the patent laws directly, it cannot, under *some other* [state] law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws .... [That] would be to permit the state to block off from the public something which federal law has said belongs to the public .... This would be too great an encroachment on the federal patent system to be tolerated.

(Emphasis added.)

The analogy to *Hamm* is obvious: the state cannot use that "some other state law," the trespass statutes, to give protection to segregationists "of a kind that clashes with objects" of the Civil Rights Act—equal availability of public accommodations. Yet, there still remains, perhaps, a qualitative difference between the way state unfair competition laws encroaches on federal patent laws, and the way trespass statutes affect the Civil Rights Act. The contact of the trespass laws with the Civil Rights Act is more oblique than that of the unfair competition laws with the patent laws. But the kind of encroachment the unfair competition laws illustrate is not the only state interference that will not be tolerated. The manifold modes of state-federal conflicts led Mr. Justice Black to remark:

> This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconciliability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case ... [the state's] law stands as an *obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*

Hines v. Davidowitz, 312 U.S. 52, 67 (1941). (Emphasis added.) On the other hand, Chief Justice Taney said in Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858):

> And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the power of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye.

[71] See Pennsylvania v. Nelson, *supra* note 66.

[72] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). (Emphasis added.) See Hill v. Florida *ex rel.* Watson, 325 U.S. 538 (1945), where the Court said, in a case in which Florida was regulating labor unions by requiring the licensing of business agents, who under Florida law, had to be a citizen for ten years:

common law rules as seemingly insignificant as a rule of estoppel, when it conflicts with a federal policy.[73] Nor need there be an actual quantum of conflict since state regulation imposing upon federal regulation can be invalid where the state regulation "would create *potential* frustration of national purposes."[74]

A continuum can thus be demarcated, ranging from actual conflict where the state seeks to regulate conduct which is the subject of federal regulation to situations where the state has brought to bear an unconnected state policy called up from its traditional sphere of action which presents only a potential clash with federal statutes. The scale has been run from state interference with federal constitutional rights, federally protected rights and privileges, to conflicts with something less than a right—conflict with federal policy, inconsistent results, obstacles to implementation of full purpose. In all of these cases federal regulation is supreme; state intervention will not be tolerated whenever it runs afoul of the federal scheme, even when the state has used only those tools of intervention which comprise a part of its traditional police powers.

Where, then, does *Hamm* fit into this scale of state-federal conflicts? *Hamm* becomes the farthest point noted to date on this continuum. *Hamm* shows the use of traditional trespass laws, which have always been within

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> The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union . . . . It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining.

325 U.S. at 543.

[73] Sola Elec. Co. v. Jefferson Co., 317 U.S. 173 (1942). The Court said at 176:

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie R. Co. v. Tompkins, 304 U.S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law . . . .
>
> When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it had adopted. To the federal statute and policy conflicting state law and policy must yield. Constitution, Art. VI.

See Liner v. Jafco, 375 U.S. 301, 307 (1964), in which the Court stated: "The issuance of the State injunction in this case *tended* to frustrate this federal *policy*. This would be true even if the picketing were prohibited conduct." (Emphasis added.)

[74] San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959). (Emphasis added.) The Court held that the state cannot regulate union activities with its unfair practices laws even when the National Labor Relations Board has declined jurisdiction because the amount of interstate commerce was small.

the sphere of state, not federal prerogatives, to affect and frustrate national policy. Its boldness lies in the fact that the federal government intervenes after the convictions. Here is no ancient state sanction suddenly revived in a new manner to frustrate an established federal policy; rather, it is the use of an existing state sanction preceding the federal policy, which up until the passage of the federal act, and even now in areas in which it will not brush against the federal act, was and is still valid. Hereafter the trespass laws are still valid, except when used to frustrate the Civil Rights Act.

The supremacy clause, as we have seen, may require state action to fall no matter how it conflicts with federal policy, and no matter how indirectly it may interfere. The problem then becomes one of timing. But certainly timing must cease to be vexatious when it is realized that these convictions were still pending when the Civil Rights Act became effective. Sit-in convictions under trespass laws at that time, during the pendency of the cases, were in conflict with the national purpose and placed an obstacle in the path of full realization of the benefits of the federal act. So, it does not matter how correctly Mr. Justice Harlan announces that past convictions cannot affect present commerce. The Civil Rights Act is not merely a regulation of commerce under which intrusions on the flow of commerce become the test of invalidity of state interference. The Civil Rights Act represents more when viewed through the supremacy clause. It becomes the supreme law of the land and interference with its policy, program, or full purpose, in any degree must fall. At the time the Supreme Court reviewed Hamm's conviction, the Civil Rights Act was the paramount law, and at that time the trespass laws tended to frustrate its effectiveness.[75]

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[75] *Hamm* is not the only situation in which blockading efforts by southern states in order to nullify federal equalitarian principles have failed. After the Supreme Court announced its famous school desegration opinion in Brown v. The Board of Education, 347 U.S. 483 (1954), the people of Arkansas passed a constitutional amendment commanding the legislature of that state to oppose that decision. Pursuant to that amendment the legislature enacted a law to relieve children from compulsory attendance at desegregated schools. In accordance with the new law the governor sent Arkansas National Guardsmen to bar Negroes from the schools. This Arkansas law was held invalid. The Court in dealing with these affronts to national purpose said in Cooper v. Aaron, 358 U.S. 1, 17-18:

> In short, the Constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously . . . ."
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> Article VI of the Constitution makes the Constitution the "supreme Law of the Land" . . . . It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. . . .

Thus no matter how circuitous and formally correct the interference is, if the state action conflicts in substance, it is invalid.

A FOURTEENTH AMENDMENT ARGUMENT

Even absent *Hamm* state trespass laws could not be used in the future to block the effectiveness of section 203 of the Civil Rights Act. The decision governs only the disposition of trespass cases pending on passage of the act. Even to activists it must seem unwise to break new ground in a field so subject to controversy as is federal preemption, especially if there is another ground on which to achieve the same result. The Court had at its disposal a more appropriate argument in light of the 1963 and 1964 civil rights cases, *i.e.*, equal protection.

In *Garner v. Louisiana*,[76] the Court reversed, for lack of evidence, a breach of peace conviction of Negroes who attempted to obtain restaurant service. Mr. Justice Douglas, in his concurring opinion,[77] put forth an equal protection argument that found state action through custom. He argued that, although Louisiana did not have a statute requiring segregation in restaurant facilities, the state did have statutes requiring separate entrances for circuses, shows, and tent exhibitions;[78] segregation of dancing, social functions, entertainment, athletic training, games, sports, contests, and other activities which require social contacts;[79] separate seating and sanitary drinking water at public entertainment or athletic contests;[80] segregation in prisons;[81] segregation of the blind;[82] segregation on trains;[83] separate waiting rooms and reception rooms to be maintained by common carriers;[84] separate toilet and drinking water facilities to be maintained by common carriers;[85] separate sanitary facilities to be maintained by employers,[86] as well as separate eating rooms and separate eating and drinking utensils for employees;[87] court dockets to reveal the race of the parties in divorce actions;[88] and segregation at all public parks, recreation centers, and playgrounds where recreational activities are conducted.[89] Louisiana also bans interracial marriages;[90] forbids teachers in public schools[91] and other state employees[92] to advocate desegregation of the public school system; and bars one race from establishing homes in a community of another race without approval of the majority of the race.[93]

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[76] 368 U.S. 157 (1961).
[77] 368 U.S. at 178.
[78] La. Rev. Stat. Ann. § 4:5 (1950).
[79] La. Rev. Stat. Ann. § 4:451 (Supp. 1964).
[80] La. Rev. Stat. Ann. § 4:452 (Supp. 1964).
[81] La. Rev. Stat. Ann. § 15:752 (1950).
[82] La. Rev. Stat. Ann. § 17:10 (1963).
[83] La. Rev. Stat. Ann. §§ 45:528, 45:532 (1950).
[84] La. Rev. Stat. Ann. § 45:1301 (Supp. 1964).
[85] La. Rev. Stat. Ann. § 45:1303 (Supp. 1964).
[86] La. Rev. Stat. Ann. § 23:971 (1964).
[87] La. Rev. Stat. Ann. § 23:972 (1964).
[88] La. Rev. Stat. Ann. § 13:917 (1950).
[89] La. Rev. Stat. Ann. § 33:4558.1 (Supp. 1964).
[90] La. Rev. Stat. Ann. § 14:79 (1950).
[91] La. Rev. Stat. Ann. §§ 17:443, 17:462 (1963).
[92] La. Rev. Stat. Ann. § 17:523 (1963).
[93] La. Rev. Stat. Ann. § 33:5066 (1950).

Such statutes, argued Mr. Justice Douglas, establish a custom of the state, which is enough state action, through its coercive effect on restaurant owners to segregate, that the fourteenth amendment can apply to transactions affected by the laws. The argument, however, went unheeded. Yet in the 1964 case of *Robinson v. Florida*,[94] though Florida did not have a statute requiring segregation in restaurants, there was a Florida Board of Health regulation[95] requiring separate toilet and lavatory facilities where Negroes are employed or accommodated. This, the Court held, was a state policy putting a direct burden on the restaurant owners to segregate.[96] The direct burden would be caused, of course, by the fact that it is cheaper to maintain a segregated restaurant than to incur the cost of building and maintaining separate toilets. One can only guess how this burden differs from the Louisiana requirements that employers provide separate sanitary facilities as well as separate rooms and eating utensils, which Mr. Justice Douglas pointed out in *Garner*. The Florida regulation would not "burden" a restaurant owner into maintaining a segregated restaurant if he hires Negroes and thus must maintain the separate facilities anyway. The state policy expressed through the Florida regulation surely does not burden the restaurant owner more than the cumulative effect of the seventeen Louisiana statutes. It would be a nice distinction that could separate such direct from indirect burdens.

The facts in *Hamm* would have been receptive to a resurrection of Mr. Justice Douglas' state-action-through-custom argument,[97] for Arkansas requires segregation in railroads,[98] waiting rooms,[99] streetcars,[100] buses,[101] schools,[102] penal institutions,[103] deaf and blind institutions,[104] chain gang eating and sleeping facilities,[105] and gambling establishments.[106] South Carolina requires segregation in station restaurants,[107] railroads and steamboats,[108] streetcars,[109] chain gangs,[110] circuses,[111] colleges,[112] textile facto-

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[94] 378 U.S. 153 (1964).

[95] Fla. Adm. Code, C 170(c), § 8.06.

[96] 378 U.S. at 156.

[97] Brief for Petitioners, pp. 46-51, Hamm v. City of Rock Hill, 377 U.S. 988 (1964).

[98] Ark. Stat. Ann. § 73-1218 (1957).

[99] Ark. Stat. Ann. § 73-1218 (1957).

[100] Ark. Stat. Ann. § 73-1614 (1957).

[101] Ark. Stat. Ann. § 73-1747 (1957).

[102] Ark. Stat. Ann. § 80-509 (1960).

[103] Ark. Stat. Ann. §§ 46-144, 46-145 (1964).

[104] Ark. Stat. Ann. § 80-2401 (1960).

[105] Ark. Stat. Ann. § 76-1119 (1957).

[106] Ark. Stat. Ann. § 84-2724 (1960).

[107] S.C. Code Ann. § 58-551 (1962).

[108] S.C. Code Ann. §§ 58-714, 58-719, 58-720 (1962).

[109] S.C. Code Ann. §§ 58-1331, 58-1340 (1962).

[110] S.C. Code Ann. §§ 55-1, 55-2 (1962).

[111] S.C. Code Ann. § 5-19 (1962).

[112] S.C. Code Ann. § 22-3 (1962).

ries,[113] parks[114] and schools.[115] Thus the argument could be made that South Carolina and Arkansas, like Louisiana, put a burden upon the restaurant owner by state participation through custom which these statutes reflect. The fine line between *Hamm* and *Robinson,* just as between *Garner* and *Robinson,* would be no obstacle to a finding that there was, indeed, state action enough to violate the equal protection clause. This position is bolstered by the Civil Rights Act of 1964 which adopts Mr. Justice Douglas' concept of state-action-through-custom in section 201(d) which declares:

> Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation . . . (2) is carried on under color of any custom or usage required or enforced by officials of the state or political subdivision thereof . . . .[116]

Custom as reflected in those statutes being the necessary state action should justify reversal of the convictions as a violation of the fourteenth amendment. The pendency of the appeals would thus cause abatement without the seeking of a new application of the supremacy clause and thus avoid the criticism directed at the uneasiness that such a course will bring.

Conclusion

Congress carved out a set of circumstances—attempts to enforce sections 201 and 202 of the act—to which state laws could not apply to negative those federal rights and privileges. The innovation in *Hamm* was that the conduct incurring the state penalty happened before federal authority was exerted in the area. But because convictions are not final until the highest reviewing court has passed upon them, the Court could hold that the common law rule of abatement obtained where intervening legislation removed the crime while the convictions are still pending. Moreover, for the first time federal law intervened upon state convictions and the Court expanded the applicability of the common law rule of abatement. To justify this use of abatement, the Court turned to the supremacy clause.

The Court, by choosing the supremacy clause as the rationale for reversal of the trespass convictions, expanded the present boundaries of supremacy application.[117] *Hamm* was not a direct intrusion of state law

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[113] S.C. Code Ann. § 40-452 (1962).

[114] S.C. Code Ann. § 51-2.1 (1962). The statute was held unconstitutional in Brown v. South Carolina State Forestry Comm'n., 226 F. Supp. 646 (E.D.S.C. 1963), and then amended in 1964 to eliminate the segregation provision.

[115] S.C. Code Ann. § 21-751 (1962). The statutes cited in notes 104-21 *supra,* appear in Brief for Petitioners, pp. 47-48, Hamm v. City of Rock Hill, *supra* note 97. I have reprinted this summary of Arkansas and South Carolina statutes substantially unchanged from the brief, taking the liberty of numbering the footnotes so to be consecutive in the scheme of this article.

[116] 78 Stat. 243 (1964), 42 U.S.C. § 2000a(d) (1964).

[117] But a place in a string citation is not the only reward *Hamm* will have. The field of labor law is much vexed with state-federal problems. Pickets, protected

into an area where federal authority had been operating, rather it was a traditional area of state law enforcement—keeping the peace through enforcement of criminal trespass statutes—into which federal law thrust itself. *Hamm* did not involve direct conflict of the state statutes with a federal statute; rather, the decision forbids only the application of these laws where that application would frustrate a clearly expressed federal policy. The criminal trespass laws of Arkansas and South Carolina remain valid and subsisting except when applied to persons attempting to enforce privileges granted by the Civil Rights Act.

Despite the lawyer-like skill and statesmanlike moderation which lie behind *Hamm's* resolution, federalism might, in the long run, have been better served by disposing of these appeals and their successors under the equal protection clause until the passage of time and the Civil Rights Act insure that the conflicts which underlie cases like *Hamm* are on their way toward abatement.

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by the Labor Management Relations Act in their demonstrations, have also run afoul of state trespass statutes. The question arose whether they are immune from arrest or injunction since they are federally protected. The Supreme Court left this question open in Amalgamated Meat Cutters v. Fairlawn Meats, 353 U.S. 20 (1957). In similar fact situation, state courts both have and have not enforced their state's trespass statutes against pickets. Compare People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385 (1961), *cert. denied,* 368 U.S. 927 (1961), with Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers, 40 Cal. Rptr. 223, 394 P.2d 921 (1964); Moreland Corp. v. Retail Store Employees, 16 Wis. 2d 496, 144 N.W.2d 876 (1962). See *In re* Zerbe 60 Cal. 2d 666, 36 Cal. Rptr. 286, 388 P.2d 182 (1964); Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W.2d 785 (1963); Freeman v. Retail Clerks, 58 Wash. 2d 426, 363 P.2d 803 (1961). The effect of a federal act on state trespass statutes as shown in *Hamm* should no longer leave that question open to doubt.